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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

MAUREEN TOFFOLONI, as Administrator and Personal Representative of the ESTATE OF NANCY E. BENOIT, Plaintiff v. LFP PUBLISHING GROUP, LLC, d/b/a Hustler Magazine, MARK SAMANSKY, an individual, and other distributors and sellers of Hustler Magazine, as Defendants X, Y, and Z, Defendants.	)	Civil Action File No. 1:08-cv-00421-TWT

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER

Defendant LFP Publishing Group, LLC, by and through its undersigned counsel, respectfully submits this memorandum of law in opposition to Plaintiff's motion for temporary restraining order enjoining publication of photographs of Nancy Benoit in *Hustler Magazine*.

Preliminary Statement and Relevant Factual Background

Plaintiff Maureen Toffoloni brings this action as Administrator and Personal Representative of the Estate of Nancy E. Benoit. For many years before her death,

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Nancy Benoit was a well-known and popular character in the immensely popular professional wrestling genre. Ms. Benoit is and was a public figure and a celebrity with tremendous popularity among fans of professional wrestling throughout the country.

In June 2007 Ms. Benoit, her husband Chris Benoit (also a professional wrestler), and their son were found dead in their home here in Georgia in an apparent double murder-suicide. The circumstances surrounding Ms. Benoit's death have been and continue to be the subject of significant public interest and covered extensively by local and national print media as well as local, national and cable television broadcasts.

In its March 2008 issue (which in the U.S. has already been printed, mailed to subscribers, shipped to distributors, sold, and replaced by the April 2008 issue), *Hustler Magazine* published a news article regarding the tragedy of Ms. Benoit's death and describing the remarkable trajectory of her career from unknown aspiring model and bikini contest participant to internationally-recognized professional wrestling superstar, and her well-publicized marriages to two celebrity wrestlers. The article is accompanied by lawfully obtained images of Ms. Benoit early in her career willingly posing fully-clothed, partially-clothed, and nude.

In addition to seeking monetary damages, Plaintiff seeks a temporary and permanent injunction enjoining publication of the photos. Plaintiff's request for an injunction is a prior restraint prohibited by the First Amendment to the U.S. Constitution. The article and accompanying photographs are serious and legitimate reporting on the high profile death of a celebrity and public figure in a matter of significant interest public interest. Such reporting falls squarely within the freedom of the press and expression guaranteed and protected by the First Amendment and may not be forcefully silenced by court decree.

In any event, Plaintiff's request for an injunction is moot. The March 2008 issue of *Hustler Magazine* in which the article and photos appear has already been published and disseminated to the public. Tens of thousands of copies of the magazine have already been mailed and received by subscribers to the magazine. Hundreds of thousands more have already been shipped to and received by distributors, and sold to customers, and have long since passed out of Defendant's control. Speech already published cannot be "unpublished."

Because the photos of Ms. Benoit have already been published, and because the photos are used to illustrate and part of a newsworthy article of substantial public interest, Plaintiff's request for a temporary restraining order is improper and should be denied.

Legal Standard

To obtain a preliminary injunction, a party must prove each of the following four elements:

(1) a substantial likelihood of success on the merits;

(2) a substantial threat of irreparable injury if the injunction were not granted;

(3) that the threatened injury to the plaintiff outweighs the harm an injunction may cause the defendant; and

(4) that granting the injunction would not disserve the public interest.

Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1265 (11th Cir. 2001).

Where the injunction sought involves a restraint against the press or a publisher, the plaintiff must establish not only the traditional elements supporting a preliminary injunction, but also that the prior restraint will be effective and that no less extreme measures are available. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562 (1976) (emphasis added).

Argument and Citation of Authority

A. The Injunction Sought By Plaintiff Is A Prior Restraint Which Presumptively Violates Both The U.S. And Georgia Constitutions

As the U.S. Supreme Court has long recognized, the injunction sought against *Hustler Magazine* is a form of prior restraint, "one of the most extraordinary remedies known to our jurisprudence." *Nebraska Press Ass'n*, 427

U.S. at 562. Indeed, for more than seventy years the U.S. Supreme Court has consistently and without exception rejected efforts to impose prior restraints on media as presumptively unconstitutional. *Id.*, at 559 ("The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.") "The damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events." *Id.*

Plaintiff seeks to enjoin continued or further publication by *Hustler Magazine* of photographs of Ms. Benoit because her estate intends to file a wrongful death action in the Superior Court of Fayette County, Georgia, and "the photographs *may* be seen by, and unfairly influence, the potential venire for the wrongful death case." (Plaintiff's Brief in Support of Motion for Temporary Restraining Order at 5, emphasis added.) But in *Nebraska Press* the U.S. Supreme Court has emphatically rejected the notion that a prior restraint may issue to address such speculative concerns that some harm may result from publication of the information:

> Our review of the pretrial record persuades us that the trial judge was justified in concluding that there would be intense and pervasive pretrial publicity concerning this case. He could also reasonably conclude, based on common man experience, that publicity might impair the defendant's right to a fair trial. . . . His conclusion as to

> the impact of such publicity on prospective jurors was of necessity speculative, dealing as he was with factors unknown and unknowable . . . Our analysis ends as it began, with a confrontation between prior restraint imposed to protect one vital constitutional guarantee and the explicit command of another that the freedom to speak and publish shall not be abridged. We reaffirm that the guarantees of freedom of expression are not an absolute prohibition under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues intact.

Id., at 563-570. Moreover, given the intense public interest in and substantial recent media coverage of Ms. Benoit's life and the circumstances of her death, Plaintiff's suggestion that somehow *Hustler Magazine's* reporting would be responsible for an impairment of her right to a fair trial (in a case not yet even filed) is not only unsupported by fact or reason, but transparently self-serving.

The prior restraint sought by Plaintiff is also prohibited by the free speech and press guarantees of the Art. I, Sec. I, Para. IV of the Constitution of Georgia, unchanged since 1877, which provides: "No law shall ever be passed to curtail, or restrain the liberty of speech, or of the press; any person may speak, write and publish his sentiments, on all subjects, being responsible for the abuse of that liberty." Rejecting any tolerance for prior restraints of the press under the Georgia Constitution, Justice Weltner wrote for the Georgia Supreme Court,

> [T]he protections of our own Constitution must remain paramount, to which must yield anything to the contrary

> found in our statutory law, or in the decisions of this or other jurisdictions, excluding only the highest court of the land. *Under its plain language, the [press] is empowered to write and speak and publish on all subjects*, ". . . being responsible for the abuse of that liberty" in the nature of an action for libel or malicious abuse of process, or for invasion of privacy . . . .

Georgia Gazette Pub. Co. v. Ramsey, 248 Ga. 528, (1981) (quoting *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190 (1905)). Thus where, as here, Plaintiff asserts a claim for monetary damages arising from alleged press "abuse" of those guaranteed liberties, an injunction against publication will not lie. *See also In re Lifetime Cable*, 17 Med. L. Rptr. 1648 (D.C. Cir. 1989), *cert. denied*, 498 U.S. 847 (1990) (vacating TRO issued by district court to prevent airing of movie scenes depicting allegations of sexual abuse by a minor because any harm resulting from such publication must be "redressed in legal actions that do not require a prior restraint in derogation of the First Amendment"). In other words, if Plaintiff is correct that *Hustler Magazine's* publication of the photos will cause Ms. Benoit's estate injury, her remedy is a legal claim for monetary damages, not a prior restraint.

B. The Relief Sought By Plaintiff Is Moot Because The Magazine Has Already Been Published, Widely Distributed, And Sold

It is well-settled that, in addition to her burden to establish the traditional elements for emergency injunctive relief, the First Amendment to the U.S.

Constitution requires that Plaintiff prove the restraint she seeks will be effective and that no less extreme measures are available. *Nebraska Press*, 427 U.S. at 562. This Plaintiff cannot do, as the images she seeks to hide from public view are already on display there, and no injunction can remedy that fact.

Indeed, countless decisions hold that once information is released into the public domain, restraints on the right to publish that information cannot be justified because the stated purpose for the restraint -- to prevent dissemination of the information -- can no longer be accomplished. *See, e.g., In re Providence Journal Co.*, 829 F.2d 1342 (1st Cir. 1986), *modified en banc*, 820 F.2d 1354 (1st Cir. 1987), *cert. denied*, 485 U.S. 693 (1988) (rejecting prior restraint where "information disclosed by the FBI had already been 'disseminated' by the media" because "[i]t is therefore hard to imagine a finding that the prior restraint would accomplish its purpose"); *see also Oklahoma Publishing Co. v. District Court*, 430 U.S. 308, 310 (1977) ("the First and Fourteenth Amendments will not permit a state court to prohibit the publication of widely disseminated information . . ."); *Kapellas v. Kofman*, 1 Cal.3d 20, 36 (1969) ("If the information reported has previously become part of the 'public domain' . . . publication will be privileged . . .").

In *Jones v. Turner*, 1995 WL 106111 (S.D.N.Y. 1995), the U.S. District Court for the Southern District of New York addressed a request for injunction nearly identical to that sought by Plaintiff here. The plaintiff, Paula Jones (who garnered nationwide notoriety by suing then-President Bill Clinton for sexual harassment), sought to enjoin *Penthouse Magazine* from publishing semi-nude photographs of Ms. Jones in various poses, including several showing Ms. Jones in the embrace of a man on a bed. The District Court rejected the prior restraint, holding that

> plaintiff has not established that the restraint which she seeks would be effective. *Penthouse* has already shipped hundreds of thousands of copies of the article in its magazines to its subscribers and distributors. Moreover, there also already has been a great deal of news coverage of the photographs and article . . . . Therefore, plaintiff is unable to demonstrate, as she must in this action, that the restraint which she requests would be effective.

Jones, 1995 WL 106111 at *21.

This case falls squarely within this long line of precedent and informative decisions demonstrating the ineffectiveness of a prior restraint when the information at issue has already been published and distributed. Hundreds of thousands of copies of the March 2008 issue of *Hustler Magazine* have been mailed to subscribers and delivered to distributors. Further, as Plaintiff's Complaint notes, public discussion of the *Hustler Magazine* article and photographs at issue is already under way. (Complaint ¶ 21.)[1] Simply put, Plaintiff's request for relief is too late, and if provided that relief would be ineffective.

C. Plaintiff's Claims Do Not Justify Emergency Injunctive Relief

1. Plaintiff Cannot Demonstrate Irreparable Harm

As discussed *supra*, the U.S. Supreme Court has clearly dispelled any notion that the only harm alleged by Plaintiff in her request for a prior restraint -- speculation as to the potential impact publication may have on jury selection in a potential wrongful death claim not yet even filed -- can support such a remedy. *Nebraska Press*, 427 U.S. at 563. The only other legal theory posed in Plaintiff's Complaint (alleged violation of Ms. Benoit's common law right of publicity) contemplated an adequate and effective remedy at law in the form of damages. *See Martin Luther King, Jr. Ctr. for Social Change v. American Heritage Prod., Inc.*, 250 Ga. 135, 142 (1982) (public figures have a right of publicity and the measure of damages for violation of that right is the value of the appropriation to the user); *see also Morton v. Beyer*, 822 F.2d 364 (3rd Cir. 1987) (alleged loss of income does not constitute irreparable harm for purposes of injunctive relief).[2]

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[1] A simple internet search confirms this fact, as well as reveals that the photos of Ms. Benoit Plaintiff seeks to enjoin from publication appear in hundreds of internet articles ranging from commentary on the *Hustler Magazine* article to celebrity blogs (*e.g.*, http://gone-hollywood.com/2008/01/nancy-benoit-nude-hustler-photos/) and professional wrestling industry websites (*e.g.*, http://www.wrestlingnewsdesk.com/WND/the_news/women_of_wrestling/the_very_first_%22hustler%22_pic_of_nancy_benoit_--_a_wrestling_news_desk_world_exclusive!_20080103542.htm).

2. The Harm An Injunction Would Cause Defendant Outweighs Any Threatened Injury To Plaintiff

Given the heavy presumption against prior restraints, Plaintiff cannot show that speculation about a future fair trial, or her damages remedies, justifies overriding Defendant's legitimate First Amendment rights. To the contrary, while ineffective to protect the interests asserted by Plaintiff, a TRO, however briefly it is in place, would do grievous injury to *Hustler Magazine's* (and the public's) rights secured by the First Amendment. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 527 U.S. 347, 373 (1976). Even if the restraint is "justified as necessary to afford the courts an opportunity to examine the claim more thoroughly," the restraint "has violated the First Amendment." *New York Times Co. v. U.S.*, 403 U.S. 713, 727 (1971) (Brennan, J., concurring). In addition, the financial burden that would be imposed upon Defendant by any injunction, at this late stage of publication and distribution, would be substantial and punitive.

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[2] Allegations of "irreparable" financial harm were made and rejected in *In re King World Productions, Inc.*, 898 F.2d 56 (6th Cir. 1990), in which the court found:

> [Plaintiff] contends, and the district court agreed, that he will have great difficulty proving damages if Inside Edition is allowed to broadcast the video tape. We fail to see how the broadcast of the video footage will hamper [Plaintiff's] ability to prove the alleged torts . . . . While he may be embarrassed by the broadcast, [Plaintiff] has simply failed to show the type of irreparable harm or injury that would tip the scale towards justifying a prior restraint of Inside Edition's first amendment freedoms to broadcast the video tape.

898 F.2d at 60.

3. Plaintiff Cannot Succeed On The Merits Of Her Right Of Publicity Claim Because Defendant's News Reporting On Ms. Benoit Is Privileged

Plaintiff's request for a prior restraint also fails because she cannot succeed on her underlying claim for violation of Ms. Benoit's right of publicity. When the Georgia Supreme Court first recognized a right of publicity claim in Georgia, it expressly held this right is limited to those circumstances in which the claimant's name or photograph "is not authorized as an exercise of freedom of the press." *Martin Luther King, Jr. Ctr. for Social Change*, 250 Ga. at 143. That limitation is fatal to Plaintiff's Complaint and request for injunctive relief.

The intense public interest in Ms. Benoit and the circumstances of her death are not in dispute. In the last several months alone her death has been the subject of thousands of broadcast and print media news reports, including reporting by *The*

New York Times, the *Washington Post*, Larry King Live, Good Morning America, and the *National Enquirer*, just to name a few. The news stories regarding her death and the ensuing investigation have been and continue to be covered by CNN, Fox News, the Associated Press, the national television networks, and nearly every local television station in the State of Georgia (where Plaintiff claims she is to bring her wrongful death claim). Even the largest Canadian television network, CBC, is repeatedly airing a special investigative report about the death of the Benoits throughout this weekend. (*See* http://www.cbc.ca/fifth.)

Notwithstanding Plaintiff's assertions to the contrary, Complaint ¶ 20, *Hustler Magazine* has a First Amendment right and privilege to report on this developing story, too. As this Court has held:

> [T]he use of Plaintiff's name and likeness in association with a "news" article cannot constitute commercial appropriation since "news" is protected by the First Amendment to the U.S. Constitution. Defendant is correct that "where an incident is a matter of public interest, or the subject of a public investigation, a publication in connection therewith can be a violation of no one's legal right of privacy." *Waters v. Fleetwood*, 212 Ga. 161, 91 S.E.2d 344 (1956). A factually accurate public disclosure is not tortious when connected with a newsworthy event. *Neff v. Time, Inc.*, 406 F.Supp. 858 (W.D. Pa.1976). *Jenkins v. Dell Publishing Co.*, 251 F.2d 447 (3d Cir. 1958).

Maples v. National Enquirer, 763 F. Supp. 1137 (N.D. Ga. 1990) (Murphy, J.) (emphasis added).

Regardless of Plaintiff's perception of its social value, *Hustler Magazine* is no less worthy of these important constitutional safeguards, which are not reserved for sober or, more importantly, sanitized public commentary. *Hustler Magazine's* March 2008 issue is protected speech. *See Johnson v. County of Los Angeles Fire Dep't*, 865 F. Sup. 1430, 1436 (C.D. Cal. 1994) (Playboy Magazine qualifies as constitutionally protected speech because it contains articles relating to politics, sports, arts, and entertainment). *Hustler Magazine* is known for provocative, and sometimes groundbreaking, social commentary; and it is entitled to the same constitutional protections enjoyed by other outlets for commentary on matters of public interest.

In short, because a TRO would not be effective; Plaintiff cannot show irreparable injury; she has an adequate remedy at law, albeit for a claim on which she is unlikely to succeed; and an injunction would do great harm to the public's interest in the information and to Defendant's First Amendment rights; Plaintiff's motion should be denied.

Conclusion

For the foregoing reasons, Defendant LFP Publishing Group, LLC respectfully requests that Plaintiff's motion for a temporary restraining order be denied.

Respectfully submitted this 7th day of February, 2008.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served the within and foregoing **DEFENDANT LFP PUBLISHING GROUP, LLC'S OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER** upon Plaintiff in the above-captioned action through the CM/ECF electronic filing system as well as by email to RDecker@dhbblaw.com and depositing a copy of the same in the United States Mail, with sufficient postage thereon, addressed to except as otherwise noted:

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This 7th day of February, 2008.

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